83-1167

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

NO.

IN RE: MOUNTAINSIDE BUTTER & EGG COMPANY,

Petitioner

Petition for Writ of Certiorari To the United States Court of Appeals for the Third Circuit

Justin P. Walder, Esq.
WALDER, SONDAK, BERKELEY & BROGAN, P.A.
Attorneys for Petitioner
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-5300

Print Masters, Route 22, Union, New Jersey 07083 (201) 964-7788

PRELIMINARY MATTER

Questions Presented

1. Did the Court of Appeals err in holding that the penalty imposed was not violative of the public interest and/or the legislative purpose of the Egg Inspection Act?

2. Did the Court of Appeals err in holding the Fifth Amendment of the United States Constitution had not been violated because its guarantee of equal protection of the laws had been violated?

3. Did the Court of Appeals err by affirming the finding of the Administrative Law Judge that the violations in question were substantial?

4. Did the Court of Appeals err by failing to consider Appellant's excellent record over the past several years, and affirming the penalty imposed in excess of four years ago, which will put Appellant out of business?

---

* The parties to the proceeding in the United States Court of Appeals for the Third Circuit were Appellant Mountainside Butter & Egg Company and the United States Department of Agriculture, Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

IN RE: MOUNTAINSIDE BUTTER & EGG COMPANY,

Petitioner

WRIT OF PETITION

OPINION BELOW

There is no written opinion of the United States Court of Appeals for the Third Circuit, though there is a judgment order. (App. A). There is no opinion of the United States Court of Appeals for the Third Circuit with respect to the Appellant's Sur Petition for Rehearing; there is an order. The opinion and order of the United States District Court for the District of New Jersey are unreported. (App. B, and App. C). There is no written opinion of the United States District Court for the District of New Jersey with respect

to the Appellant's Motion for Reconsideration, though there is an order. The decision and order of the judicial officer of the Office of the Secretary of Agriculture are unreported. (App. D). The reissuance of decision and order of the Administrative Law Judge is unreported. (App. E). The preliminary statement of the Administrative Law Judge is unreported. (App. D includes this preliminary statement).

JURISDICTIONAL GROUNDS IN THIS COURT

The order of the United States Court of Appeals for the Third Circuit here sought to be reviewed is dated September 20, 1983 (App. A). That order affirmed without opinion the judgment of the District Court of New Jersey entered June 23, 1982 (App. B). That Judgment granted the Appellee's cross-motion for summary

judgment, thereby dismissing the Appellant's complaint for judicial review of the final agency action of the United States Department of Agriculture, withdrawing egg inspection services from the Appellant's egg processing plant, pursuant to proceedings governed by the Administrative Procedures Act, 5 U.S.C. Section 701, et seq.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the United States Constitution and federal regulations involved are set forth in Appendix H.

STATEMENT OF THE CASE

BACKGROUND

Mountainside Butter & Egg Company (hereinafter "Mountainside") is the oldest

licensed egg breaking plant in the State of New Jersey. (6T1038-6 to 7).[1] An egg processing plant such as Mountainside uses products that are classified as "restricted" eggs, which are eggs that would normally not be sold in the supermarket and are already dirty or cracked. (7T94-5 to 24). Mountainside is a family-owned business which was begun by the father of Leon and Seymour Goldsman several years ago. Leon Goldsman testified that he began work in the egg processing business as a child, working with his father. The business was later expanded to two garages at the location of his home, and the family bought land in Elizabeth, New Jersey, in 1954 and erected the first phase of its buildings. (6T1039-4 to 8).

Both Leon and Seymour are totally involved on a daily basis with the

---

[1]References to the transcripts of testimony will be as follows:

operation of the plant. Seymour Goldsman testified that he is present at the plant from 7:30 in the morning until approximately 8 or 9 in the evening (6T979-9 to 6T908-11). As Leon Goldsman testified: "I work very hard. I'm in that room constantly. There isn't one plant where the owner puts in as much time and effort as at Mountainside." (8T284-18 to 20). Betty Goldsman, wife of Leon, also works at the plant (5T899-13 to 16). The

---

"1T" refers to the transcript of August 23, 1977.
"2T" refers to the transcript of August 24, 1977.
"3T" refers to the transcript of August 25, 1977.
"4T" refers to the transcript of August 26, 1977.
"5T" refers to the transcript of September 7, 1977.
"6T" refers to the transcript of September 8, 1977.
"7T" refers to the transcript of April 29, 1980.
"8T" refers to the transcript of April 30, 1980.

Goldsmans are entirely supported by this business, with no outside investments or income (8T273-2 to 13).

On January 3, 1977, the United States Department of Agriculture (hereinafter "USDA"), filed an administrative complaint with USDA, alleging that Mountainside had violated various regulations relating to the processing of egg products. This complaint was filed pursuant to the authority of Section 6(b) of the Egg Products Inspection Act (21 U.S.C. §1031, et seq.), (hereinafter the "Act") and the regulations promulgated thereunder (7 CFR Part 59).

The complaint sought to withdraw egg inspection services performed by USDA for Mountainside. Without such inspection services, the business cannot operate. On January 7, 1977, the parties entered into a

stipulation and consent order (App. F), providing, among other things, as follows:

(a) The stipulation did not constitute an admission or denial by Mountainside that it had violated any of the regulations or statutes involved (App. F, p. 32a, par. 3);

(b) Egg products inspection services at Mountainside's processing plant would be continued to be administered in a "fair and reasonable manner consistent with the administration of the egg products inspection service at all other official plants subject to such inspection." (App. F, p. 33a, par. 6); and

(c) Egg inspection services were withdrawn for a period of 12 months, provided that such withdrawal was held in abeyance and did not become effective unless within one year from the effective date of the order Mountainside failed to

comply with any provisions of the order or permitted "substantial violations which would be a basis for withdrawal of egg inspection services as specified in 7 CFR Part 59.160(f)(1)." (App. F, p. 33a, para. 1).

A formal Consent Order was issued on January 10, 1977 by the Administrative Law Judge, to the foregoing effect, incorporating by reference the aforesaid stipulations. (App. G). On April 27, 1977, USDA filed a motion for imposition of sanction and for oral hearing, claiming various violations of the order of January 10, 1977, by Mountainside. Specifically, the motion charged failure to properly segregate shell egg breaking stock (7 CFR Part 59.510), failure to cause liquid egg to be held in the re-examination vat and to properly re-examine such liquid egg before

being further processed (7 CFR Part 59.522), and failure to cause inedible egg products to be properly denatured (dyed) in order to prevent inedible egg products from being blended into edible egg products (7 CFR Part 59.504(c) and Part 59.522). These violations were alleged to have taken place during the period February through May, 1977. A hearing was held on August 23 through August 26, and September 7 through September 8, 1977. Mountainside denied these violations and introduced testimony in opposition to these charges.

On March 17, 1978, the Administrative Law Judge entered a decision and order, invoking the 12 month suspension of egg products inspection service provided for by the terms of the Consent Order entered on January 10, 1977. (App. D includes this decision and order). After further legal

proceedings a remand hearing was held by the Administrative Law Judge who entered an order in effect reissuing without modification (except for an inconsequential finding) his prior order of March 17, 1978. On August 19, 1980, the Judicial Officer entered a decision and order upholding the determination of the Administrative Law Judge. (App. D). The Judicial Officer further issued a stay pending judicial review.

Mountainside filed a complaint in the Federal District Court seeking review of Judge Campbell's decision and order. The USDA subsequently filed a motion for summary judgment which was granted. Appellant appealed to the United States Court of Appeals for the Third Circuit which entered a Judgment Order affirming the decision of the District Court. (App.

A). No oral argument was entertained by the Court. Mountainside's sur petition for rehearing was also denied.

THE TESTIMONY

During the course of the proceedings below, various inspectors for USDA[2] testified regarding daily reports prepared by them during the course of their inspections at the Mountainside plant. These reports were entitled "Daily Report of Plant Operation" (PY Form 203), commonly called "203's". These 203's were cited by the Administrative Law Judge and the Judicial Officer as a basis for triggering the provision of the Consent Order requiring withdrawal of egg inspection services for one year. Specifically, Line 37 of these reports reflected the alleged violations.

---

[2]These people were actually employed by the State of New Jersey but conducted inspections and prepared inspection reports for USDA.

The inspectors testified concerning their finding of certain ineligible[3] eggs in the breaking room during the egg-breaking process. Once detected, the ineligible eggs are removed from the process and placed in a denaturant (dye) to distinquish the ineligibles from the eligibles.

Inspector Robert Poggio acknowledged that approximately 300,000 eggs are processed per day at the Mountainside plant (2T301-7 to 17). Mr. Poggio testified that since Mountainside was subject to constant inspection, the percentages reflected on a 203 report indicated the actual number of eggs found to be defective on a particular day. Mr. Poggio testified that he would look at 100 eggs and would

---

[3]These eggs are referred to in the reports as "leakers", "moldies" and "dirties".

find two or three ineligibles. (2T301-18 to 24). Therefore, the indication that there was 2%, 3% or 5% of eggs defective on a given sample, normally meant that those were the number of eggs found to be defective on that date (2T301-25 to 2T302-6). It can hardly be said that 5, 10 or even 20 eggs out of 300,000 being processed in a particular day is substantial.

Ed Hoerning, Supervisory Egg Products Inspector for USDA, acknowledged that normally there were flexibilities built into the inspection system. (4T653-15 to 4T655-12). In other words, there were certain reasonable tolerances allowed. When pressed as to whether a one or two percent ineligibles would be allowed, his answer was "It might be. It might not be. I don't know how to answer that." (4T657-3 to

8). In any event, given the 280,000 eggs processed per day, the actual number of ineligibles was considerably lower than one percent.

Since Mountainside processed almost 300,000 eggs per day, the number of alleged violations during the time period in question must be viewed in the context of the millions of eggs processed from February through May, 1977. The number of alleged violations must also be viewed in the context that Mountainside was subjected to the unique method of double inspection and constant oversight of the egg-breaking process which did not exist at other plants.

The USDA complaint also claimed violations relating to the denaturing of inedible eggs. Denaturing was generally accomplished by placing ineligible eggs in

a bucket of dye, coloring them blue or green to distinguish them from the edible egg products, so that the inedible eggs would not be blended with the edibles. The testimony indicated that Mountainside took substantial steps to assure the proper denaturing of the eggs. (5T901-3-21, 5T906-5T910, and 6T1053-3 to 4). Also, it should be noted that there was never any indication, nor did Judge Palmer find, that any of the eggs which were placed in buckets for denaturing were ever used or blended with the edible products.

The de minimus aspect of the alleged violations is compounded by the fact that Mountainside was subject to the unique method of double inspection, not applied in other plants. It was acknowledged by the USDA and the inspectors that one inspector per plant was normal procedure (1T115-1 to

6; 4T730-16 to 20), and that it was abnormal for two inspectors to be working full-time at inspection stations (1T24-6 to 15; 7T54-2 to 17; 4T730-16 to 20; 5T845-9 to 10). Howard Maguire, a USDA official, acknowledged on cross-examination that there is a distinction when two inspectors are working, as opposed to one -- where there are two inspectors, one is normally in the breaking room actually watching the egg process, while the other inspector can carry out other work duties. This doesn't exist in other plants where one inspector must do all of the chores and therefore is not constantly inspecting. (5T847-13 to 5T848-3). The witness acknowledged that this differentiated Mountainside from other plants (5T848-18 to 22). Mr. Hoerning testified as follows:

> Q. All right. So to the extent that this plant had two inspectors and had continuous

observation of breaking-room procedures, and whatever other procedures were being watched, it was being treated differently than other plants?

"A. Yes.

"Q. As a matter of fact, certainly, if they had two inspectors watching most of the time, that would be different than at other plants, wouldn't it?

"A. Yes, where there is only one inspector assigned to a plant.

"Q. If you take a plant the size of Mountainside and you have two inspectors constantly watching all operations, wouldn't you expect to see more adverse information on the 203 reports?

"A. Yes, you would certainly --if those noncompliances were occurring -- observe more of them.

"Q. Every plant, I think we agreed, in some ways at different times have noncompliances?

"A. The potential is there." (5T848-13 to 5T849-6).

The testimony and 203 reports indicated that where ineligibles were noted

by the inspectors, they were corrected, and there was never any instance during the entire period of time alleged in the complaint that a single instance of salmonella bacteria had been reported back from the laboratory testing Mountainside's end product (3T431-8 to 13; 4T699-1 to 4). The central purpose of the Egg Products Inspection Act is to prevent the carrying of salmonella and other bacteria into commerce, which has been accomplished by Mountainside.

Testimony adduced at the hearings below indicated that the number of incidents of imperfect eggs at Mountainside was not inconsistent with what occurred at other plants. A daily Inspector, William Botelho, testified as to his observations at the Mountainside plant:

> "Q. Now, you've been to Mountainside. As far as you're concerned, is it in any way different from any other plant?

"A. No sir.

"Q. Does it ever have any violations?

"A. Yes, sir.

"Q. Do other plants have any violations?

"A. Yes, sir.

"Q. Is there any difference, as far as you're concerned, in the degree of violations?

"A. No, sir.

"Q. Is there any difference in the degree of sanitariness of the operations?

"A. No sir." (7T148-17 to 7T149-4).

Irene Salt, another inspector, testified that in comparison to another local plant, Papetti's in Elizabeth, New Jersey, the situation at Mountainside was no different. She testified that the total number of non-complying eggs, or percentage of non-complying eggs, is about the same at

Papetti's as it was at Mountainside (8T265-15 to 17). Other testimony of inspectors, as well as an expert presented by Mountainside, was adduced to the same effect.

Mountainside's expert witness Ward Oden testified that he is familiar with many egg processing plants across the country which are similar to Mountainside. He stated that at no other plant had he observed the type of double inspections which occurred at Mountainside. Furthermore, Mr. Oden testified that when compared to other plants, the equipment and operation of the Mountainside plant was substantially the same or better. (3T49-3T51).

It was conceded by Irene Salt that the main difference between Mountainside and other plants, and the basis for the

allegations leading to withdrawal of egg inspection services, was that the principals of Mountainside often disputed the characterization of eggs by inspectors as ineligible, leading to hostility between the inspectors and Mountainside. After conceding that the total number of non-complying eggs or percentage of non-complying eggs is the same at another New Jersey plant, Papetti's (still enjoying inspection services), Ms. Salt acknowledged that the only real difference between the plants was that at Mountainside there were arguments regarding the question as to whether the eggs were eligible or ineligible (7T264-12 to 7T265-24).

THE STIPULATION AND CONSENT ORDER

The Stipulation and Consent Order of January 7, 1977, which was based on prior allegations, similar to the ones made in the instant matter, specifically provided:

> This Stipulation and Consent Order and Motion is for settlement purposes in these proceedings only and does not constitute an admission or denial by respondent that it has violated any of the regulations or statutes involved. (App. F, p. 32a, par. 3). (Emphasis supplied).

This Stipulation was incorporated into the Consent Order of January 10, 1977 (App. G). This Consent Order provided that withdrawal of egg inspection services would not become effective unless within one year from the date of the Order the respondent "committed substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 CFR 59.160(f)(1)." (Emphasis added).

Given the fact that the prior allegations preceding the Consent Order had not been admitted by Mountainside (nor proved), the Administrative Law Judge noted

that he would not consider any such alleged prior violations as grounds for his decision (2T195-17 to 24; 2T198-1 to 4). Nevertheless, faced with a record that did not support the allegation that violations from February through May, 1977 were "substantial", the Administrative Law Judge improperly, and contrary to his prior statements, based his decision to approve withdrawal of inspection services on these prior violations:

> "Inasmuch as the violations which occurred during February through May, 1977 were identical in kind to those underlying the Consent Order, they necessarily are 'substantial violations' of the regulations calling for a twelve-month withdrawal of inspection services under its terms...." (See App. D, p. 22a). (Emphasis added).

The Judicial Officer adopted the decision of the Administrative Law Judge, incorporating it in his Order. (See App.

D). It is submitted that this reasoning was improper and not in accordance with the Stipulation of the parties. In addition, such reasoning was a clear error in judgment, was not supported by the evidence, and constituted an arbitrary, capricious and unreasonable determination.

The withdrawal of inspection services from Mountainside will result in Mountainside going out of business. Leon Goldsman testified that the suspension of egg inspection services to Mountainside will cause loss of suppliers and customers and the closing down of the plant. As acknowledged by USDA in its brief in the Federal District Court, the imposition of the penalty imposed below will result in Mountainside's inability to market its egg products. The Administrative Law Judge recognized that withdrawal of egg

inspection services would result in a closing down of the Mountainside plant (8T288-6 to 7).

Leon Goldsman indicated that egg processing is a highly competitive business in which suppliers will be compelled to go elsewhere and would be difficult to re-cultivate (8T275-8T276). Seymour Goldsman also testified as to the loss of suppliers and customers should the suspension of 12 months be imposed (6T1040-18 to 6T1041-10). He testified that substantial overhead would still exist despite the fact that employees would be discharged (6T1041-18 to 6T1042-4). This result is inconsistent with the public interest and with the legislative purpose of the Act.

As indicated before, the record indicated no instance of salmonella in the end product produced by Mountainside. No

danger to the public health is at stake in this matter. Moreover, since the time period referred to in the allegations of the Complaint, the 203 reports regarding Mountainside's plant have improved substantially. Throughout the course of these proceedings Mountainside has tried to have each tribunal take note of its excellent record as evidenced by its improved 203 reports. Towards this goal on June 20, 1978 Mountainside filed a motion with the USDA's Judicial Officer for a re-hearing, re-argument and reconsideration, and to reopen the record. Likewise Mountainside filed a Notice of Motion to expand the record so that the Federal District Court would be able to review the 203 reports for the months of May, 1981, and January and February, 1982, and attached those reports as exhibits to an

affidavit submitted in support thereof. (Exhibit 6 which has been marked as part of the record as a proferred proof and 203's attached to Mountainside's motion to the District Court to expand the record, which are part of the record below).

Mountainside contends that the United States Court of Appeals for the Third Circuit did not fully address the issues raised by Mountainside below and that its Order affirming the decision of the District Court Judge, which affirmed the decision of the Administrative Law Judge, was in error. It is respectfully requested that this Court grant the petition for a writ of certiorari so that Mountainside may continue to operate and produce products in accordance with the standards in the industry.

EXISTENCE OF JURISDICTION BELOW

Mountainside brought suit in the District Court on December 1, 1980. The complaint which was filed sought review of the Administrative Law Judge's decision and order. (App. D). This complaint was filed pursuant to 21 U.S.C. §1050, which provides the United States District Court with jurisdiction to enforce compliance and to restrain violations of the Egg Products Inspection Act.

REASONS FOR GRANTING THE WRIT

The imposition of a 12-month suspension of egg products inspection service will destroy Mountainside's business and force it to close. This result should not be permitted in light of the faulty reasoning employed by the Administrative Law Judge and the fact that his findings were arbitrary, capricious and unreasonable.

In addition, Mountainside's record over the past several years since the alleged violations occurring between February and May, 1977 has been excellent, and the destruction of its business is inconsistent not only with applicable principles of law, but with sound economic policy. The record below constitutes an insufficient basis upon which to destroy a business. In today's economy, when most governmental efforts are directed to supporting and maintaining small businesses, the imposition of the penalty imposed on Mountainside is unnecessarily harsh. This is especially so in light of the improving conditions reflected by more recent 203's previously cited. It is respectfully requested that this Court intervene to prevent Mountainside's demise.

I. The legislative purpose of the Egg Products Inspection Act and the public interest are inconsistent with the twelve-month suspension of egg inspection services.

The imposition of the penalty in question will put Mountainside Butter & Egg out of business. This is not in the interest of the public or in furtherance of the legislative purpose of the Egg Products Inspection Act. As indicated in the legislative history to the Act, the statute was designed to both strengthen the ability of Federal and State governments to protect consumers and to provide an environment where the egg products and shell egg industries may continue to flourish. See House Report No. 91-1670, P.L. 91-597.

The punishment of a one year suspension of egg inspection services, which would result in putting Mountainside out of business, is inconsistent with the

public interest and with the very purpose of the Egg Products Inspection Act to permit the egg products industry "to flourish". One might conclude differently if the facts demonstrated that there was a real danger to the public health by the continued operation of the plant. However, the record does not support this contention. The ultimate objective of the Act is to prevent salmonella bacteria from entering the consumer market. House Report No. 91-1670, p. 2. The record indicates that no incident of salmonella was ever reported on Mountainside's products, demonstrating that Mountainside is processing pure and wholesome products for the public. In addition, since the entry of the decision in this matter, the 203 reports of USDA have improved considerably. See Exhibit 6, which has been marked as

part of the record as a proferred proof and which, it is submitted, should have been considered by the Administrative Law Judge in his determination of the punishment. See also exhibits attached to Mountainside's motion to the District Court to expand the record, i.e., more recent 203's, which demonstrate this improvement.

It should be noted that there was testimony that the systems and procedures utilized in the Mountainside plant met the necessary standards and that Mountainside operated on an approved system (3T303-15 to 21). Mr. Hoerning acknowledged in his testimony that the installation of new machines which had been installed at the Mountainside plant would help solve some of the problems encountered during February through May, 1977, especially those relating to the hand-breaking procedures

(4T729-4 to 13). Mr. Maguire acknowledged that the plant facilities and procedures at Mountainside met existing standards, and that there were sufficient employees to meet the work load (5T781-2 to 19; 5T810-21 to 5T811-4). He also indicated that when non-compliances were brought to the attention of management, they were corrected.

The public interest will not be served by putting this family-owned business out of operation. In the General Statement to House Report No. 91-1670 on the Egg Products Inspection Act, the purpose of the Act is set forth as follows:

> This proposal is designed to strengthen the ability of Federal and State government to protect the Nation's consumers and to provide an environment where the egg products and shell egg industries will continue to flourish. Thus, a concerted effort will be made to assure that eggs and egg products...are safe and wholesome for consumers.

As the record indicated, there was never any report of salmonella or any other contaminant in any of the Mountainside products. In addition, increased freezing and pasteurization facilities have been undertaken at the expense of $35,000.00, which was taken out as a loan by Mountainside (6T1056-15 to 18). The total cost of new machinery since the end of 1976 was approximately $150,000.00. Seymour Goldsman testified to improvements made to the plant since January, 1977. A new automatic feeder and an overhaul of prior machines provided Mountainside with two complete automatic feed machines, thus keeping "leakers" to a minimum (6T1055-2 to 11). These improvements in addition to the new Henningson machine and the Seymour washer provided Mountainside with equipment that was superior to those of most other

plants (6T1055-12 to 20). There is no basis upon which this operation should not be allowed to "flourish" in accordance with the legislative purpose set forth in the General Statements quoted above.

During the course of the proceedings, Mountainside offered in evidence 203 reports for the month of April, 1980, in order to demonstrate improvements made on these reports. (See Ex. 6). Line 37 of those reports demonstrates a substantial improvement on the 203's from February through May, 1977. (It is submitted that Judge Palmer should have considered these 203's in mitigation of the penalty imposed. He declined to do so. These 203's were made part of the record as a proffer of proof). Further sample months, May, 1981, and January and February, 1982, were submitted to the District Court on

Plaintiff's motion to expand the record as further examples of improved conditions. Many days on these samples indicate no ineligibles whatsoever.

21 U.S.C. §1047 and the administrative regulations under which the penalties were imposed in the instant matter, are remedial, not punitive. It is submitted that the public interest will not be served by destroying the business of Mountainside Butter & Egg and lessening the competition in the egg processing business in this area. Subsequent steps taken by Mountainside, including the purchasing of new equipment, have substantially improved matters at the Mountainside plant. Since the legislation is remedial and not punitive, such subsequent improvements should be considered. See, to the foregoing effect, Beck v. SEC, 430 F.2d. 673, 675 (6

Cir. 1970). Surely there are other remedies under the Act which could be invoked if and when necessary.[4]

Based on all of the above, it is submitted that it is in the interest of the public and in accordance with the legislative purpose of the Egg Products Inspection Act to allow Mountainside to continue in business rather than put into effect the devastating order withdrawing inspection services for one year, which will effectively put Mountainside out of business. Counsel acknowledges that normally reviewing courts will pay deference to remedies fashioned by administrative agencies. However, where such remedies impair statutory objectives, a court should diligently inquire into the

---

[4] §1042-Violations are reported to any U.S. Attorney for the institution of criminal proceedings or to issue a notice of warning to the alleged violator; §1047 - Inspection

justification for such remedies. Papercraft Corporation v. F.T.C., 472 F.2d. 927, 933 (7 Cir. 1973). As indicated above, the statutory objectives and the remedial nature of the legislation are not served by the one year withdrawal of inspection services imposed by the agency below. There is no special need for this exceptional remedy under the facts and

---

services may not be provided or withdrawn if the applicant or recipient is found to be unfit; §1048 - Violative products may be administratively detained; §1049 -Violative articles may be proceeded against, in rem, and seized and condemned; §1050 - The U.S. District Court is given jurisdiction to enforce compliance and restrain violations. (On April 19, 1976, the complainant brought such an action seeking a mandatory injunction directing the respondent to comply with the Act. On April 20, 1976, Mountainside consented to the issuance of the injunction and it still remains outstanding to date. Complainant has not sought to enforce the injunction, however, but has instead instituted the present proceeding.) §1051 - Other federal laws may be used to aid in enforcement as well as giving the Secretary the authority to prosecute inquiries necessary to his duties.

circumstances in the instant case. To that extent, the imposition of this penalty constitutes an abuse of discretion and is certainly inconsistent with the public interest and the legislative purpose of the Egg Products Inspection Act.

II. The Fifth Amendment of the United States Constitution guarantee of equal protection of the laws has been violated by the uneven application to Mountainside of the Egg Products Inspection Act.

In this case, Mountainside has been fighting since April, 1977 to prevent the withdrawal of egg product inspection services for a period of one year. This fight started when the USDA filed a motion for imposition of sanction and for oral hearing by claiming that the Consent Order of January 10, 1977 had been violated by Mountainside.

The Consent Order of January 7, 1977 provides in paragraph 6 of the Stipulation

that the egg products inspection service at Mountainside will be administered in a "fair and reasonable manner consistent with the administration of the egg products inspection service at all other official plants subject to such inspection." It is submitted that this provision of the Consent Order has been violated and that egg inspection service has not been administered in a fair and reasonable manner consistent with the administration of such inspection services at other official plants. Indeed, Mountainside has been targeted for unique, selective inspection, which has resulted in its present difficulties.

Mr. Hoerning testified that since Mountainside has two inspectors at its plant, it was being treated differently from other plants. (5T848-13 to 5T849-6).

It is common sense that two inspectors constantly viewing the egg process will discover more alleged violations than one inspector who must divide his time between actual inspection and administrative work. The scrutiny under which Mountainside was placed by the inspectors was admittedly different substantially from the inspections under which other plants were supervised. Under the terms of the Consent Order, they were to be treated like any other plant.

William Botelho, a daily inspector, testified that Mountainside was no different from other egg processing plants, especially with respect to its degree of violations of the operations. (7T148-17 to 7T149-4). Irene Salt, another daily inspector, acknowledged that the violations at Mountainside were no different than that

of another major New Jersey plant, Pappetti's, which still enjoys inspection services of the Department of Agriculture. Her testimony indicated that the actions taken against Mountainside were due in part to hostility between U.S.D.A. officials and the principals of Mountainside. (8T264-12 to 8T265-24). Ward Oden, Mountainside's expert, likewise confirmed that Mountainside is substantially similar to other plants he is familiar with throughout the United States (3T49-3T51).

The atmosphere of bad feelings between authorities at U.S.D.A. and the principals of Mountainside is made clear in the testimony of Mr. Hoerning at 3T91, where he indicates that the disagreements would become arguments and shouting matches, leading to a deterioration in rapport. This is not pointed out simply to take up

sides as to who was right or who was wrong, but merely to indicate the attitudes which prevailed in early 1977, during the unusually concentrated inspections and alleged violations which occurred at Mountainside. This is especially important in light of the testimony and evidence that Mountainside was really no different, if not better, in terms of compliance, than other plants.

Withdrawal of inspection services is a rarely invoked remedy. It would appear that the law is not being applied evenly to parties in similar situations. In essence, Mountainside has been denied the equal protection of the laws guaranteed under the Fifth Amendment of the United States. While the Fifth Amendment does not contain an equal protection clause per se, it does forbid discrimination that is "so

unjustifiable as to be violative of due process." Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190 (1964). The Supreme Court has approached the Fifth Amendment equal protection claims in the same way as equal protection claims have been approached under the Fourteenth Amendment. Weinberger v. Wiesenfeld, 430 U.S. 636, 95 S.Ct. 1225, 1228, n. 2 (1975); Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 670 (1976). The concept of equal protection has been traditionally viewed as requiring a uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964). Clearly, Mountainside is not receiving uniform treatment that has been provided to other plants standing in the same relation to the

Department of Agriculture. The Due Process and equal protection rights of Mountainside have been violated and, at the minimum, fundamental fairness has been denied to Mountainside by virtue of the uneven application of the Department's standards and penalties.

III. The decision of the Administrative Law Judge which found that Mountainside had committed "substantial violations" (in violation of its Consent Order) was based on erroneous reasoning, was arbitrary, capricious and unreasonable and should not have been affirmed by the lower tribunals.

In this case the opinion of the USDA's judicial officer was incorporated in the final determination of the Administrative Law Judge. The judicial officer's decision, however, is based on a faulty premise. He found that the violations alleged in the complaint were substantial

"inasmuch as the violations which occurred during February through May, 1977, were identical in kind to those underlying the Consent Order...":

> Inasmuch as the violations which occurred during February through May, 1977 were identical in kind to those underlying the consent order, they necessarily are 'substantial violations' of the regulations calling for a twelve month withdrawal of inspection services under its terms... (App. D, p. 22a). (Emphasis added).

The Administrative Law Judge adopted this reasoning when he noted that:

> ...the withdrawal of inspection services for 12 months is not a sanction imposed because of the violations proven in this case, but because of the violations which form the basis for the consent order... (App. D, p. 12a).

The Consent Order specifically stated that the stipulations did not constitute an admission by Mountainside that it had

violated any of the regulations or statutes involved (App. F, p. 32a). Ironically, the Administrative Law Judge had previously indicated during the course of the proceedings that he would not consider any prior alleged violations pre-dating the consent order (2T195-17 to 24; 2T198-1 to 4). The Judge's reliance on the underlying allegations which precipitated the Consent Order as a basis for finding that the alleged violations in February through May, 1977, not covered by the Consent Order, were "substantial", constituted prejudicial error.

The alleged violations should be judged on their own merits, and not on the basis of prior alleged violations. There were no proofs whatsoever as to these prior allegations. Certainly, it is understandable that Mountainside may have

preferred to enter into the Consent Order as a practical matter in order to continue its business and avoid protracted and costly litigation. It was certainly inappropriate and unfair for the judge to base his finding of "substantial violations" on the basis of prior allegations neither admitted nor proved.

This argument was made before the lower court at the hearing on the motion, but the Court never responded to this argument in its opinion (App. B). This issue was again raised by Mountainside in its motion for reconsideration (see par. 5 of John Brogan's affidavit dated July 23, 1982), which was denied. The determinations below, affirmed by the District Court and the Third Circuit Court of Appeals, were clearly faulty. The circular reasoning employed to support these determinations should be rejected by this Court.

The District Court stated in its opinion:

> ...The ALJ [Administrative Law Judge] heard the testimony of four different inspectors, assessed their credibility and ultimately determined that in fact Mountainside had committed substantial violations of the regulations and had violated the consent degree. Accordingly, he withdrew inspection services for twelve months. (App. B, p. 4a).

The District Court did not analyze the rationale of the Administrative Law Judge leading to the conclusion that there were "substantial violations". The Administrative Law Judge, the District Court and the Third Circuit Court of Appeals each failed to address the faulty rationale of the judicial officer who found "substantial violations" on the basis of prior allegations, neither admitted nor proved.

The validity of an agency's determination must be judged on the basis

of the agency's stated reasons for making that determination. Industrial Union Department v. American Petroleum, 448 U.S. 607, 100 S.Ct. 2844, 2858, n. 31 (1980). An administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained. Id., and cases cited therein. Clearly, the basis for upholding the decision that the violations in question were "substantial", because they were of the same type underlying the previous complaint preceding the consent order, which were neither admitted nor proved, was based on a reasoning process which begged the question. The Consent Order specifically stated that egg inspection services would not be withdrawn unless within one year from the date of the Order Mountainside

committed substantial violations which would be a basis for withdrawal under the regulations. Violations are not "substantial" simply because they are of the same nature as those alleged (not admitted or proven) in a prior complaint. As indicated above, the determination below was based on consideration of irrelevant factors resulting in a clear error of judgment. Thus, the determination was in fact arbitrary, capricious and unreasonable. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 823-824 (1971).

The judicial officer and the administrative law judge apparently did not find that the violations in and of themselves were "substantial", but relied on the fact that they were the same type of alleged violations which preceded the

Consent Order. These prior alleged violations were neither admitted by Mountainside, nor proved by the USDA, nor were they a proper consideration in determining whether egg inspection services should be withdrawn in the instant matter.

IV. If the penalty which was imposed over four years ago is permitted to stand, Mountainside's excellent record over the past several years will have been ignored and Mountainside will be forced to cease operating.

On March 17, 1978 the Administrative Law Judge entered a decision and order which invoked the 12-month suspension of egg products inspection service provided for by the terms of the Consent Order entered on January 10, 1977 (App. D includes this decision). Since the imposition of this penalty Mountainside has purchased new equipment and a more conducive attitude to suggested violations

has substantially improved the Mountainside plant. This is reflected in the 203's which Mountainside has attempted to bring to the attention of the the USDA's Judicial Officer (a motion for re-hearing, re-argument and reconsideration, and to reopen the record) and the District Court Judge (a motion to expand the record). Mountainside's excellent record over the past several years militates against the imposition of this one year penalty which will cause the oldest licensed egg breaking plant in New Jersey to cease operating. This unfair result should not be permitted to occur.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the petition for writ of certiorari should be granted.

Respectfully submitted,

JUSTIN P. WALDER
for Petitioner Mountainside
Butter and Egg Company

83-1167

In The

Supreme Court Of The United States

OCTOBER TERM, 1983

NO.

IN RE: MOUNTAINSIDE BUTTER & EGG COMPANY,

Petitioner

Appendix to Petition for Writ of Certiorari To the United States Court of Appeals for the Third Circuit

Justin P. Walder, Esq.
WALDER, SONDAK, BERKELEY & BROGAN, P.A.
Attorneys for Petitioner
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 992-5300

Print Masters, Route 22, Union, New Jersey 07083 (201) 964-7766

TABLE OF CONTENTS

APPENDIX A

Judgement Order of The
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
No. 82-5788
(Filed — September 20, 1983)

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Witness, the Honorable Judge,
Joseph F. Weis, Jr.,
Circuit Judge

Attest:
Sally Mrvos, Clerk,
United States Court of Appeals
for the Third Circuit.

APPENDIX B

Opinion of The
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
No. 80-3898
(Filed — June 23, 1982)

FISHER, Chief Judge.

Mountainside Butter & Egg Company (Mountainside) seeks judicial review of a final agency action by the Judicial Officer of the United States Department of Agriculture (USDA) pursuant to section 701 **et seq.** of the Administrative Procedure Act, 5 U.S.C. §701, **et seq.** Mountainside also moves to expand the record below. USDA cross moves for summary judgment. For the reasons stated herein, the Government's motion for summary judgment is granted.

Mountainside operates an egg-products processing plant subject to the terms and provisions of the Egg Product Inspection Act, 21 U.S.C. §§1031-1056 (the Act), and the regulations thereunder, 7 C.F.R. §2859. The statutory criteria of the Act require the Secretary of Agriculture to "cause continuous inspection to be made" of egg-processing plants "for the purpose of preventing the entry into or flow or movement in commerce of, or the burdening of commerce by, any egg product which is...misbranded or adulterated." 21 U.S.C. §1034(a). The Secretary has the authority to retain or segregate eggs and egg products as he deems necessary, 21 U.S.C. §1034(b), to condemn or destroy adulterated eggs or egg products, 21 U.S.C. §1034(c), or to refuse inspection of any plant which fails "to meet the requirements of this section." 21 U.S.C. §1035(b). Unless the eggs and egg products are inspected, their sale and transportation in commerce is prohibited. 21 U.S.C.

§1037(b). Persons violating section 1037 may be prosecuted pursuant to 21 U.S.C. §1041. Thus, an administrative action denying an egg processor inspection services prevents that processor from marketing its eggs or egg products.

Mountainside processes eggs by breaking their shells and then pasteurizing and cooling the contents, which is sold in thirty-pound cans to bakeries and other commercial outlets. The fresh eggs which it processes are normally not of a quality suitable for sale in their shells. Typically, plaintiff purchases eggs of the type defined in the Act as "restricted eggs," being "checks" with cracked or broken shells or "dirty eggs" with dirt or other foreign material adhered to the shells. 21 U.S.C. §1033.

Mountainside accomplished the breaking of shell eggs for processing by two methods–automatic egg-breaking machines or hand-breaking stations. At the hand-breaking machines employees would use knives to break the shells over trays into which the contents would be dropped and from whence it flowed into metal buckets. Because of the nature and source of the egg stock commonly used by Mountainside, it is most important that all steps in the process be conducted with care to avoid the possibility of harmful adulteration.

The major functions in an egg-processing plant may be described as inspection, regulation, cleansing, breaking, pasteurization and packaging. The nature of the product and the functions involved in its processing afford ample opportunity for the contamination prohibited by the Act.

On January 3, 1977, USDA filed an administrative complaint alleging that Mountainside had violated various regulations relating to the processing of egg products. Subsequent to the filing of the complaint, Mountainside and USDA entered into a stipulation, on

January 7, 1977, leading to the issuance of a consent order, under the terms of which inspection services were to be withdrawn from Mountainside for twelve months if, within one year from January 14, 1977, it failed to comply with any provisions of the order or committed substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 C.F.R. §5960(f) (1). Thereafter, USDA moved to impose sanctions pursuant to the consent order, charging Mountainside with commission of various violations during the period of February through May 1977.

There were two extensive evidentiary hearings in which the administrative law judge (ALJ) produced a lengthy record of eleven volumes. The ALJ heard the testimony of four different inspectors, assessed their credibility and ultimately determined that in fact Mountainside had committed substantial violations of the regulations and had violated the consent decree. Accordingly, he withrew inspection services for twelve months.

The issue in this case is whether or not the ALJ's findings were supported by substantial evidence. Substantial evidence is something less than the weight of the evidence; the possibility of drawing two inconsistent conclusions from the evidence does not render the evidence insubstantial. *Consolo v. Federal Maritime Comm'n.*, 383 U.S. 607, 620 (1966). It is enough that the evidence adduced before an agency is such as a reasonable mind might accept as adequate to support the conclusion under review. *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 477 (1951); *National Council, etc. v. Subversive Activities Cont. Bd.*, 322 F.2d 375, 388 (D.C. Cir. 1963). The Supreme Court reiterated this when it stated,

> we have consistently expressed the view that ordinarily review of an administrative decision is to be confined to "consideration of the decision of the

> agency...and of the evidence on which it was based."..."[T]he focal point for judicial review should be the administrative record made initially in the reviewing court."...

FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) (citations omitted).

The record indicates that Mountainside repeatedly and consistently engaged in at least three types of regulatory violations which affect the quality of egg products and cause a hazard to public health.

First, inspectors observed repeated failure to control the segregation of shell egg breaking stock entering the breaking room in violation of 7 C.F.R. §2859. USDA inspectors testified that they observed 883 instances of dirty-looking or moldy shell eggs entering the breaking room on conveyor lines. The percent of ineligible eggs entering the breaking room on conveyor lines was in excess of 20 percent in 16 instances, 11 to 20 percent in 45 instances, 6 to 10 percent in 318 instances, and 1 to 5 percent in 504 instances. I am satisfied that those percentages are substantial.

The second type of violation was Mountainside's failure to denature inedible eggs with a distinctively colored dye to prevent the blending of inedible eggs and edible and egg products as required by 7 C.F.R. §2859.504(c). The record demonstrates that there was clear, convincing evidence that Mountainside had repeatedly failed to properly denature its inedible eggs and egg products. Inspectors observed 103 instances when inedible eggs contained insufficient amounts of dye in violation of the applicable regulations.

Mountainside's third type of violation was its failure to re-examine egg liquid for wholesomeness before emptying it from the smaller holding tank into the large general tank, as required by 7 C.F.R. §2859.22(f). Evidence was presented at the administrative hearing that, on at least 27 different occasions, inspectors noted

that Mountainside permitted egg products to be pumped directly into the holding tank without first being collected for re-examination.

Mountainside argues that the finding of substantial violations was unsupported by the evidence and attempts to bolster this argument by demonstrating that there was never a single instance during entire period alleged in the compiaint that salmonella bacteria had been reported from laboratory testing. Furthermore, Mountainside contends that the record does not contain any evidence to indicate that it had sold any of the eggs that had been improperly denatured.

The essential purpose of the Act is to protect consumers from adulterated eggs. **See** 21 U.S.C. §1032, **et seq.** In section 1033(a) the Act specifies that the term "adulterated" is applicable to any egg product

> ...
>
> (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for human food;
>
> (4) if it has been prepared, packaged, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have become injurious to health.

21 U.S.C. §1033 (a) (3) & (4).

By definition then, pasteurization of an egg product, even though the process destroys harmful bacteria such as salmonella, does not preclude the product from being found to be adulterated. The presence of filth or the product's preparation under unsanitary conditions renders an egg product adulterated within the meaning of the Act. *United States v. 1,200 cans, Pasteurized Whole Eggs, Etc.*, 339 F. Supp. 131 (N.D. Ga. 1972); **see also,** *United States v. Wiesenfield Warehouse Co.*, 376 U.S. 86 (1964).

Mountainside asserts that the enforcement of regulations against it was selective, biased and unfair and,

therefore, Mountainside is being denied equal protection of the law as guaranteed under the fifth amendment.

As I stated sbove, four different inspectors testified and each recounted the same pattern of violations. The ALJ found their testimony to be more reliable than that given in Mountainside's behalf. He also found that each inspector conducted inspections at Mountainside's plant in a fair and reasonable manner consistent with inspections conducted at all other official plants. Therefore, there is no basis for a finding of denial of equal protection.

I find unsuported the argument of Mountainside that Judge Palmer improperly considered prior violations in his determination of substantial violations warranting withdrawal of service for one year. The findings were supported adequately by the evidence presented by the four inspectors of violations which occurred during the one-year period as set out in the consent order. I have reviewed the record and I find it complete. There is nothing in the record to indicate that the ALJ acted erroneously or without justification.

The granting of the motion for summary judgment is dispositive of the motion to expand the record. An order accompanies this opinion. No costs.

June 23, 1982.

APPENDIX C

Order of The
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
No. 80-3898
(Filed — June 23, 1982)

For the reasons set forth in the court's opinion filed this date, it is on the 23rd day of June, 1982,

ORDERED that the motion of the Government for summary judgment is granted. No costs.

Clarkson S. Fisher, Chief Judge
United States District Court

APPENDIX D

Decision and Order of The
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
I & G Docket No. 64
(Dated — August 19, 1980)

This is an action under the Egg Products Inspection Act (21 U.S.C. §§1031-1056) to withdraw egg products inspection services from respondent, a corporation which operates an egg products processing plant, because of respondent's alleged violations of a consent order filed January 10, 1977. The consent order provides:

1. Egg Products Inspection Services are hereby withdrawn from the respondent, its officers, agents, servants, employees, representatives, and all persons in active concert or participation with it for a period of twelve (12) months: **Provided, however,** That such withdrawal shall be held in abeyance and shall not become effective unless, within one (1) year from the effective date of the Order, the respondent or any officer, employee, agent, servant or representative of respondent fails to comply with any provisions of the Order or commits substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 CFR 59.160(f) (1). Such failure to comply or commission of any such offense shall be deemed to have been established only after opportunity for hearing and final decision in a formal adjudicatory proceeding before the Secretary with all rights of judicial review exhausted. In such event, inspection services shall be withdrawn for the full period of twelve (12) months, and such withdrawal shall become effective immediately without further procedure.

After a hearing, Administrative Law Judge Victor W. Palmer filed an initial decision and order on March 17, 1978, in which he found that during the period February through May 1977 respondent committed numerous and repeated "substantial violations of the regulations which would be a basis for withdrawal of inspection services under 7 CFR 2859.160(f) (1)" (Initial Decision, at 10). Accordingly, he concluded that the 12-month suspension provided for in the consent order should be effectuated.

On June 30, 1978, respondent appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§556 and 557 has been delegated (7 C.F.R. §2.35).[1]

On October 27, 1978, the Judicial Officer remanded the proceeding to the Administrative Law Judge for further proceedings, 38 Agric. Dec. 789. Respondent's motion to reconsider the remand order was denied on November 29, 1978, 38 Agric. Dec. 196. After further proceedings, Judge Palmer reissued his decision and order on May 20, 1980, and respondent again appealed to the Judicial Officer on July 15, 1980.

---

[1] The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), **reprinted in** 5 U.S.C. app., at 764 **and in** 67 Stat. 633 (1953). The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litgation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyard Act regulatory program).

Oral argument before the Judicial Officer, which is discretionary (7 C.F.R. §1.145(d)), was heard in connection with respondent's original appeal and is again requested by respondent on this appeal. However, inasmuch as the issues have been thoroughly briefed and further oral argument would not seem to be helpful in deciding the case, respondent's request for oral argument is denied.

After a careful consideration of the entire record in this proceeding, Judge Palmer's initial decision and order, as reissued, and his order reissuing his initial decision, are adopted as the final decision and order in this proceeding, Finding 8 of the initial decision is not part of the final decision inasmuch as it was stricken by Judge Palmer when he reissued his decision and order, but it is included herein so that one reading this decision will know its contents. The prior orders by the Judicial Officer in this proceeding are incorporated by reference herein and made a part hereof. The order issued in this decision is identical to the order issued by Judge Palmer except that the effective date has been changed in view of the appeal.

At the remand hearing, Judge Palmer permitted Leon Goldsman to testify in the nature of an offer of proof (Tr. 268-293). This testimony was beyond the scope of the remand order and, therefore, has not been considered as evidence at this stage of the proceeding. However, Judge Palmer very wisely permitted the testimony to be included fully in the record so that if it were later determined that the testimoney should be received as evidence, a second remand would not be required.

Even if the testimony of Leon Goldsman were considered as evidence, it would not change the result in this proceeding. Mr. Goldsman testified as to his changed attitude and his present compliance with the regulations. Respondent relies on this testimony in support of its argument that the 12-month withdrawal of suspen-

sion services provided for in the consent order is too harsh. However, as previously explained in the remand order, 38 Agric. Dec. at 799-800, the withdrawal of inspection services for 12 months is not a sanction imposed because of the violations proven in this case but because of the violations which formed the basis for the consent order. The violations proven in this case merely triggered the sanction agreed to by respondent, acting with the advice of counsel, based on the violations which formed the basis for the consent order. Accordingly, there is no basis for considering what sanction should be imposed in this case for the violations which formed the basis for the consent order.

Moreover, even if we were to determine in this proceeding the appropriate sanction to be imposed for proven violations, as stated in the remand order in this proceeding, "it has been consistently held that evidence of current compliance with the Department's regulatory programs is totally irrelevant in determining the sanction for past violations" (38 Agric. Dec. at 800).

ADMINISTRATIVE LAW JUDGE'S ORIGINAL DECISION

Preliminary Statement

This is a proceeding pursuant to the Egg Products Inspection Act (21 U.S.C. 1031-1056, hereinafter referred to as the "Act") and the regulations thereunder (7 CFR Part 2859, designated prior to June 21, 1977, as 7 CFR Part 59) to determine whether Egg Products Inspection Service should be withdrawn from the respondent, a corporation which operates an egg products processing plant.

On January 10, 1977, a consent order was entered against respondent under the terms of which inspection service is to be withdrawn from respondent for 12 months, if, within one year from January 14, 1977,

respondent "fails to comply with any provisions of this order or commits substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 CFR 59.160(f) (i)."

Complainant filed a motion on April 27, 1977, which it supplemented on June 3, 1977, charging respondent with the commission of such substantial violations during the period February through May 1977. The violations alleged are of three types.

1. Repeated failures to comply with the requirements of 7 CFR 59.510 to properly sort out, in the transfer area of the plant, inedible and other eggs ineligible for breaking thereby permitting such eggs to enter the breaking room for processing into egg products.

2. Repeated failures to comply with the requirements of 7 CFR 59.522 to cause liquid egg to be held in a reexamination vat and to properly reexamine such liquid egg before allowing it to enter the holding tanks for further processing.

3. Repeated failures to comply with the requirements of 7 CFR §§59.504(c) and 59.522 to cause all inedible eggs to be properly denatured to prevent inedible egg products from being blended into edible egg products.

Respondent's answer denies the alleged violations and asserts that the employees of the USDA interpreted the Act and the regulations "in an arbitrary and discriminatory manner so as to make such laws and regulations unconstitutional and to deprive the respondent of its property and property rights without compensation or due process of law...."

Following a prehearing conference on July 7, 1977, oral hearing was held before me on August 23-26 and September 7-8, 1977, in Newark, New Jersey. Complainant was represented at the hearing by Mr. Thomas R. Clark and Mr. Daniel W. Wentzell, both of the Office of the General Counsel, United States Department of Agriculture. Mr. Bernard Chazen of Englewood, New

Jersey, represented respondent. In addition, Mr. Althear Lester appeared on behalf of the limited intervenor, United Trades Independent Union, Local 18. Briefing was completed on February 27, 1978.

Findings

1. Respondent, Mountainside Butter and Egg Company is a New Jersey corporation which has its principal place of business at 706 Trumbull Street, Elizabeth, New Jersey 07206, where it operates an "official plant," as defined in 21 U.S.C. 1033 (q), where egg products are processed under inspection by the Department of Agriculture. Respondent's official plant designation is No. 1366 and has received official egg products inspection since July 26, 1971. Mr. Leon Goldsman is President of the respondent corporation and his brother, Seymour Goldsman, is its Vice-President.

2. Respondent processes eggs by breaking and removing their shells and then pasteurizing and cooling their contents which it packages and sells in 30 pound cans to bakeries and other commercial outlets. The fresh eggs it so processes are normally not of a quality suitable for sale in their shells to consumers. Typically, respondent purchases eggs of the type defined in the Act as "restricted eggs," being "checks" with cracked or broken shells, or "dirty eggs" with dirt or other foreign material adhered to the shells (21 U.S.C. §1033). The Act prohibits the use of restricted eggs in the preparation of human food for commerce except as authorized by the regulations prescribed by the Secretary of Agriculture (21 U.S.C. §1037(a)).

3. During the months of February, March, April and May 1977, respondent accomplished the breaking of shell eggs for processing either by two automatic egg breaking machines (a Henningson Maxima breaker without an egg washer and a Seymour 102 breaking

machine with a washer) or at four handbreaking stations where employees would use knives to break shells over trays, known as the Canadian-type, into which the egg yolk and white would be dropped before flowing into metal buckets. All breaking equipment was located in a portion of the plant designated as the breaking room. Before reaching this room, the eggs passed through an adjacent room designated as the transfer room where the eggs were either placed on the conveyors that took them directly into the breaking room through an opening in a wall common to both rooms or were placed in hand-breaking baskets to be washed, sanitized and segregated. In addition to the types of restricted eggs purchased by respondent, handling in the transfer room could cause "leakers" and "loss eggs."

4. During the period of February through May 1977, inspection at respondent's plant was performed daily by two egg products inspectors. Five different inspectors were assigned to respondent's plant during this period: Irene Salt, R. Botelho, Robert Poggio, Thomas Thompson and Thomas Zaccone. Ms. Salt and Mr. Zaccone were assigned to Mountainside for a greater proportion of this time period than the other inspectors. Mr. Botelho spent only two weeks in the plant during February 1977. In accordance with the provisions of the regulations the inspectors performed sanitation checks of respondent's equipment and plant facility before and during each day's processing operations and checked the operating procedures used by respondent in all phases of the egg products processing operation. In addition, the inspectors prepared daily inspection tours, and noting any additional observations pertinent to respondent's compliance with required operating procedures.

5. A. Section 2859.510 of the regulations (7 CFR 2859.510) provides in pertinent part:

(a) The shell eggs shall be sorted and classified into the following categories in a manner approved by

the National Supervisor:
(1) Eggs listed in paragraph (d) of this section.
(2) Dirty.
(3) Leakers as described in paragraph (c) (2) of this section.

...

(5) Other eggs — satisfactory for use as breaking stock.

...

(c) Shell eggs, when presented for breaking, shall be of edible interior quality and the shell shall be sound and free of adhering dirt and foreign material, except that:
(1) Checks and eggs with a portion of the shell missing may be used when the shell is free of adhering dirt and foreign material and the shell membranes are not ruptured.
(2) Eggs with clean shells which are damaged in candling and/or transfer and have a portion of the shell and shell membranes missing may be used only when the yolk is unbroken and the contents of the egg are not exuding over the outside shell. Such eggs shall be placed in leaker trays and broken promptly.
(3) Eggs with meat or blood spots may be used if the spots are removed in an acceptable manner.
(d) All loss or inedible eggs shall be placed in a designated container and be handled as required in section 2859.504(c). Inedible and loss eggs for the purpose of this section and in section 2859.522 are defined to include black rots, white rots, mixed rots, green whites, eggs with diffused blood in the albumen or on the yolk, crusted yolks, stuck yolks, developed embryos at or beyond the blood ring state, moldy eggs, sour eggs, any eggs that are adulterated as such term is defined pursuant to this part, and any other filthy and decomposed eggs....

B. The National Supervisor's approved manner for segregating shell eggs is set forth in the Egg Products Inspector Handbook, which is an official document published by the USDA and is available to egg products inspectors and official plant operators. Section 5 of the handbook specifies in pertinent part:

A. **Shell Eggs**

1. All shell eggs entering or located in the official plant are subject to the regulations.

Shell eggs are to be checked for loss, leakers, dirties, odors, and eggs other than those of the domesticated chicken and segregated prior to entering the breaking rooms....

2. a. **Clean Egg** — The shell egg is free of adhering dirt or foreign material. Only clean shell eggs are satisfactory for breaking.

...

b. **Leaker** — An egg that has a broken shell and shell membrane ruptured to the extent that the egg contents are exuding or free to exude through the shell.

Leakers made prior to transfer or candling (case leakers) and leakers resulting from shell egg washing (other than by thermal expansion) may not be used for breaking. These are classified as loss. Shell eggs damaged in transfer or candling may be used for breaking only when the yolk is unbroken, the shell is clean, and the outside of the shell is essentially free of egg meat. These eggs must be properly segregated, placed in clean leaker trays, and broken promptly by specially trained personnel.

...

4. a. Checks which have evidence of mold shall be discarded as inedible.

b. Sound shell eggs which contain spots of solid mold growth on the shell or other extreme

moldy conditions are to be discarded as inedible. (Exhibit 17, Sec. 5, III,, pp. 5-6).

C. During the period of February through May 1977, the inspectors observed the repeated failure of respondent to control the segregation of shell egg breaking stock entering the breaking room. They observed and noted 883 instances of dirty, leaking or moldy shell eggs being allowed to enter the breaking room for processing on the conveyor lines feeding the automatic breaking machines. The percentage of ineligible eggs observed to have entered the breaking room was in excess of 20 percent in 16 instances; 11 to 20 percent in 45 instances; 6 to 10 percent in 318 instances; and 1 to 5 percent in 504 of the instances. Overall, 379 (43 percent) of these 883 instances involved the presenting of over 5 percent ineligible eggs in the breaking room. Additionally, the inspectors noted 68 instances in which eggs which should have been totally discarded were placed in trays and sent to the breaking room.

6. A. Section 2859.504(c) of the regulations (7 CFR 2859.504(c) provides as follows:

> (c) All loss and inedible eggs or egg products shall be placed in a container clearly labeled 'inedible' and containing a sufficient amount of approved denaturant or decharacterant, such as FD&C brown, blue, black, or green colors, meat and fish by-products, grain and milling by-products, or any other substance, as approved by the Administrator, that will accomplish the purposes of this section. Shell eggs shall be crushed and the substance shall be dispersed through the product in amounts sufficient to give the product a distinctive appearance or odor...

B. At respondent's plant facility, denaturing is accomplished through the use of blue dye which is to be poured into contiiners at the beginning of each day and during the course of operations in sufficient quantity to

give the inedible eggs and egg products a distinctive color not resembling edible egg products. Proper denaturing has been achieved when the inedible product takes on a greenish tint or color. One small container for loss and inedible eggs and egg products was located in the breaking room and seven larger containers were kept in the transfer room for that purpose.

C. During the period of February through May 1977, the inspectors observed the repeated failure by respondent to properly denature loss and inedible eggs and egg products. In particular, they observed and noted 103 occasions on which the inedible egg and egg products collected in the containers contained an insufficient amount of dye.

7. A. Section 2859.522 of the regulations (7 CFR 2859.522) provides, in pertinent part, as follows:

> (f) Each shell shall be broken in a satisfactory and sanitary manner and inspected for wholesomeness by smelling the shell or the egg meat and by visual examination at the time of breaking. All egg meat shall be reexamined by a person qualified to perform such functions before being emptied into the tank or churn, except as otherwise approved by the National Supervisor.
>
> ...
>
> (aa)...
>
> (2)...All liquid egg pumped directly from egg breaking machines shall be reexamined, except as otherwise prescribed and approved by the Administrator.

B. Respondent's automatic breaking machines are connected to two "reexamination" or "sniff" tanks which are to be used for the purpose of organoleptic reexamination of the liquid egg pumped directly from the breaking machines. The tanks are designed so that one can be filled while the other is drained. Likewise, the valves can be adjusted so that egg products are not ac-

cumulated in either tank and are pumped directly into the larger holding tank. Proper operation of these reexamination tanks results when the egg products are always accumulated in one tank or the other for purposes of reexamination. Alternatively, improper operation of the reexamination tanks results from the direct pumping of egg products into respondents holding tank or churn without being held for reexamination. Egg products processors may not direct pump egg products without reexamination unless they have received prior approval from the USDA. Respondent has received no such approval.

C. During the period of February through May 1977, the inspectors observed respondent to permit, on at least 27 occasions, egg products to be pumped directly into its holding tank or churn without first being collected in a reexamination tank and without being reexamined. This failure to reexamine resulted from failure to properly adjust the appropriate drain valve.

8. A copy of the daily inspection report prepared by each inspector during the relevant period was provided to respondent's management by one of the inspectors near the end of each day of operation. In addition, the inspectors were available during and at the end of each day to discuss with respondent's management any notations or entries on the inspection reports, or any problems with the operating procedures encountered by the inspectors. Mr. Hoerning, the supervisory egg products inspector with responsibility for inspection at respondent's plant, made supervisory inspection visits to respondent's plant on March 15, 17 and 25, April 26 and May 10, 1977. Except for discussions with the inspectors or Mr. Hoerning during his supervisory visits during the relevant period, respondent did not register with the USDA any formal or informal complaints or appeals for the review of the inspectors' reports.

Conclusions

The use by respondent of unauthorized operating practices and procedures during the relevant period, as set forth in the Findings, constitutes substantial violations of the regulations which would be a basis for withdrawal of inspection services under 7 CFR 2859.160(f) (1). The record does not establish that the inspectors or any of their superiors acted in an arbitrary and discriminatory manner in interpreting and applying the Act and regulations to respondent's egg products processing operation.

The appropriate sanction is a 12 month suspension of Egg Products Inspection Service in accordance with the terms of the consent order entered on January 10, 1977. Although respondent was permitted to present evidence that would establish such "extraordinary circumstances," within the meaning of *In re Indiana Slaughtering Company*, 35 Agri. Dec. 1822, 1827 (1976), as would warrant the agreement's overturn, it has failed to do so. Nor has respondent otherwise presented convincing evidence that would lead the Secretary and those delegated to act in his place, to reconsider the sanction specified by the consent order.

When the parties moved for the entry of the consent order, they stipulated to the accuracy of the following facts. Respondent's inspection service had been suspended on October 1 through 3, 1975, and on March 29 through 30, 1976, for alleged use of operating practices and procedures which were not in accordance with the regulations; those suspensions were terminated on the basis of assurances of future compliance with the regulations; and, on April 20, 1976, respondent consented to the issuance of an injunction by the United States District Court for the District of New Jersey (Civil No. 76-699) enjoining it from processing egg products without complying with the regulations.

On January 3, 1977, the underlying complaint was filed charging respondent with violating the regulations during May through December 17, 1976, by the same three types of operating practices which are now charged to have occurred subsequent to the effective date of the consent order. Furthermore, the measures specified in the affirmative action letter which respondent submitted on January 25, 1977 (Cx 31), pursuant to the consent order, were specifically designed to prevent these three types of practices. The entry of the consent order on January 10, 1977, terminated a suspension of inspection services which had commenced on December 28, 1976, for the alleged May through December 17, 1976 violations.

Inasmuch as the violations which occurred during February through May 1977 were identical in kind to those underlying the consent order, they necessarily are "substantial violations" of the regulations calling for a 12 month withdrawal of inspection services under its terms. Respondent's various arguments to the contrary have been considered and found to be without merit.

Respondent contends that since the product it processes is pasteurized, the condition of the egg ingredient is not of substantial importance and that the condition of the egg shells is wholly meaningless since they are discarded along with any dirt adhered to them. Respondent next asserts that it has been picked on by inspectors who are trying to impress their supervisor, are too strict and fussy, are aggressive to the point of belligerence, are anti-Semitic, and have otherwise not administered inspection services in a fair and reasonable manner.

Four different inspectors testified and each recounted the same pattern of violations. Their testimony is found to be more credible and reliable than that given in respondent's behalf. Each inspector is found to have conducted inspections at respondent's plant in a fair

and reasonable manner consistent with inspections conducted at all other official plants.

Central to this proceeding is the protection of consumers from adulterated egg products. That is the essential purpose of the Act; the very reason why Congress made inspection of egg processing plants mandatory. **See** 21 U.S.C. §1032.

The Act specifies that the term "adulterated" is applicable to any egg or egg product:

> (3)if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for human food;
>
> (4)if it has been prepared, packaged, or held under unsanitary conditions whereby it may have become contaminated with filth, or whereby it may have become injurious to health. (21 U.S.C §1033(a)).

By defination then, pasteurization of an egg product, even though the process destroys harmful bacteria such as those causing salmonella, does not preclude the product from being found to be adulterated. The presence of filth or the product's preparation under insanitary conditions renders an egg product "adulterated" within the meaning of the Act. *See United States v. 1,200 Cans, Pasteurized Whole Eggs, Etc.*, 339 F. Supp. 131 (D.C. Ga. 1972); *United States v. Wiesenfeld Warehouse Co.*, 376 U.S. 86 (1964).

Respondent customarily purchases eggs that are "checks" or "dirties" for its processing operations. The Act permits such eggs to be bought by any business in commerce only as authorized by Department of Agriculture regulations. (21 U.S.C. §1037(a)).

Section 2859.510 of those regulations establishes the standards to be observed for sorting out shell eggs which may not enter, except that "checked eggs" and "transfer leakers"[1] may also be presented for breaking under certain circumstances. Eggs ineligible for breaking are prohibited from entering the breaking room to preserve its sanitary condition which must be in a dust-free, clean condition (7 CFR 2859.522).

The claims of fussiness, prejudice, and arbitrary and capricious rulings by the various inspectors largely stem from the refusal on the part of the Goldsmans to accept the fact that the regulations do not permit eggs with certain types of defects to ever be salvaged and that before a dirty egg with a sound shell may be broken, it must be so thoroughly washed that no dirt remains. The Goldsmans believe tolerances should be allowed and often engaged in debates with the inspectors as to whether or not an individual egg was correctly determined to be ineligible for breaking. In particular, respondent contends that a spot of dirt on a shell does not result in adulterated egg product, ignoring the fact that the dirt may be dislodged upon breaking and fall into the liquid egg being collected. In any event, there are no tolerances for filth under the Act as written. *See 338 Cartons v. United States*, 165 F.2d 728, 731 (4th Cir. 1947). And, even so, the inspectors did not report minor defects.

---

[1] A transfer leaker is an egg with a clean shell that was cracked while being transferred from the egg case and which has unbroken yolk and no albumen exuding to the outside shell. It may be handbroken only by special personnel after being removed in the transfer room and placed on special trays.

The disputative attitude of the Goldsmans towards the inspectors apparently affected the employees in the transfer room who continued to allow ineligible eggs to be conveyed to the breaking room. Attempts to correct such practices were always short-lived and never permanent.

The Goldsmans failed to establish clear chains of responsibility for the various procedures required to safeguard the public from adulterated egg products.

The regulations require that a denaturant, such as dye, must be mixed into the containers where rotten, moldy or other types of inedible eggs are deposited, in an amount sufficient to clearly identify the contents and preclude such adulterated eggs from later finding their way, accidentally or by design, to those who would use them to prepare food for human consumption. This responsibility was shared by nearly everyone associated with the plant and, as a result, was often performed by no one.

Requisite sniffing of eggs and egg products prior to pasteurization to detect the presence of rotten eggs was a matter of happenstance at best. The inspectors have reported that valves which had to be closed for such examinations to be made were repeatedly left open allowing the eggs broken by the machines to flow through unexamined.

For these reasons, therefore, the following order shall be issued.

ADMINISTRATIVE LAW JUDGE'S REISSUANCE OF DECISION

On March 17, 1978, I issued a decision and order in which I found that, during the period February through May 1977, respondent, a corporation which operates an egg products processing plant, committed numerous, repeated and substantial violations of applicable regula-

tions which would be a basis for withdrawal of egg products inspection services from respondent's plant under 7 CFR 2859.160(f)(1). It was concluded that a 12-month suspension, required under such circumstances by a prior consent order of January 10, 1977, should therefore be effectuated.

On October 27, 1978, the Judicial Officer remanded this case for further proceedings to allow respondent's counsel to cross-examine the inspectors complainant had called as witnesses in respect to various memoranda not provided respondent until after the hearing had concluded. The remand order would also allow newly discovered evidence to be introduced concerning the reasons why respondent failed to appeal inspectors' reports as specified in Finding 8.

On April 29-30, 1980, subsequent to the conclusion of a lengthy investigation of charges lodged by respondent against complainant's personnel and subsequent to the granting of time to respondent to obtain new counsel after Messrs. McDonald and George each struck his appearance, the remand hearing was held in Newark, New Jersey. At its opening, the remand order was reviewed with counsel and I advised that in my opinion, Finding 8 was not material to the essential issue in this proceeding of whether respondent violated the terms of the consent order.

Counsel for respondent was then permitted wide scope in cross-examining each of the inspectors who had previously testified respecting their attitudes towards the Goldsmans and whether it affected their inspection activities. William Botelho, an inspector who had been to respondent's plant on an intermittent basis as a relief man during the period in question and who neither complainant nor respondent had called at the original hearing, was also examined by respondent's counsel who was permitted to inquire into Mr. Botelho's observations of the attitude of the other inspectors

respecting the Goldsmans. Mr. Leon Goldsman was also permitted to testify about inspector attitude.

Having observed each of the inspectors undergo cross-examination for a second time by another trained and skillful trial attorney, I am, if anything, even more convinced that each inspector is credible and that each, under most trying and difficult circumstances, faithfully performed his or her duties and responsibilities. Their testimony that they observed repeated and numerous violations of the regulations of the sort that are substantial under the terms of the consent order is therefore accepted as being true and trustworthy.

Accordingly, except for the deletion of Finding 8, the decision of March 17, 1978, is herewith re-issued without modification and the following order will be entered.

ORDER

Egg Products Inspection Services under the Egg Products Inspection Act are hereby withdrawn from respondent, its officers, agents, servants, employees, rep-resentatives, and all persons in active concert or participation with it for a period of twelve (12) months.

This Decision and Order shall beome effective thirty-five (35) days after service upon the respondent.

Done at Washington, D.C.
August 19, 1980
Donald A. Campbell
Judicial Officer
Office of the Secretary

APPENDIX E

Re-issuance of Decision and Order of The
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
I & G Docket No. 64
(Dated — May 20, 1980)

on March 17, 1978, I issued a decision and order in which I found that, during the period February through May 1977, respondent, a corporation which operates an egg products processing plant, committed numerous, repeated and substantial violations of applicable regulations which would be a basis for withdrawal of egg products inspection services from respondent's plant under 7 CFR 2859.160(f)(1). It was concluded that a 12-month suspension, required under such circumstances by a prior consent order of January 10, 1977, should therefore be effectuated.

On October 27, 1978, the Judicial Officer remanded this case for further proceedings to allow respondent's counsel to cross-examine the inspectors complainant had called as witnesses in respect to various memoranda not provided respondent until after the hearing had concluded. The remand order would also allow newly discovered evidence to be introduced concerning the reasons why respondent failed to appeal inspectors' reports as specified in Finding 8.

On April 29-30, 1980, subsequent to the conclusion of a lengthy investigation of charges lodged by respondent against complainant's personnel and subsequent to the granting of time to respondent to obtain new counsel after Messrs. McDonald and George each struck his appearance, the remand hearing was held in Newark, New Jersey. At its opening, the remand order was reviewed with counsel and I advised that in my opinion, Finding 8

was not material to the essential issue in this proceeding of whether respondent violated the terms of the consent order.

Counsel for respondent was then permitted wide scope in cross-examining each of the inspectors who had previously testified respecting their attitudes towards the Goldsmans and whether it affected their inspection activities. William Botelho, an inspector who had been to respondent's plant on an intermittent basis as a relief man during the period in question and who neither complianant nor respondent had called at the original hearing, was also examined by respondent's counsel who was permitted to inquire into Mr. Botelho's observations of the attitude of the other inspectors respecting the Goldsmasns. Mr. Leon Goldsman was also permitted to testify about inspector attitude.

Having observed each of the inspectors undergo cross-examination for a second time by another trained and skillful trial attorney, I am, if anything, even more convinced that each inspector is credible and that each, under most trying and difficult circumstances, faithfully performed his or her duties and responsibilities. Their testimony that they observed repeated and numerous violations of the regulations of the sort that are substantial under the terms of the consent order is therefore accepted as being true and trustworthy.

Accordingly, except for the deletion of Finding 8, the decision of March 17, 1978, is herewith re-issued without modification and the following order will be entered.

ORDER

Egg Products Inspection Services under the Egg Products Inspection Act are hereby withdrawn from respondent, its officers, agents, servants, employees, representatives, and all persons in active concert or participation with it for a period of twelve (12) months.

This Decision and Order shall become final and effective thirty-five (35) days after service upon the respondent unless appealed to the Judicial Officer within thirty (30) days of service pursuant to section 1.145 of the rules of practice.

Copies hereof shall be served upon the parties.

Done at Washington, D.C.
this 20th day of May 1980
Victor W. Palmer
Administrative Law Judge

APPENDIX F

Stipulation and Consent Order and Motion For Insurance of the Order of The
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
I & G Docket No. 64
(Dated — January 7, 1977)

These are proceedings under the Egg Products Inspection Act (21 U.S.C. 1031 **et. seq.**), and regulations promulgated thereunder (7 CFR Part 59) to withdraw Federal egg products inspection services from the respondent. The proceedings were commenced by a complaint issued by H. Connor Kennett, Jr., Director of the Poultry Division, Agricultural Marketing Service (AMS), United States Department of Agriculture (USDA), alleging that respondent has repeatedly used operating practices or procedures which are not in accordance with the regulations and that respondent failed to take corrective action within a specified period of time. Respondent's egg products inspection was suspended by the Director effective December 28, 1976, and respondent was granted through December 30, 1976, to take corrective action to insure that proper operating practices and procedures as specified in the regulations will be followed at its plant on a continuing basis. The parties have determined that these proceedings should be terminated by a Stipulation and Consent Order:

IT IS HEREBY STIPULATED, by and between the respondent by its duly authorized officer and attorney, and the Director, Poultry Division, AMS, and USDA counsel that:

1. Respondent, Mountainside Butter and Egg Company is a New Jersey corporation with its principal place of business located at 706 Trumball Street,

Elizabeth, New Jersey 07206, operating an official egg products processing plant (defined 21 U.S.C. 1033 (q)). Pursuant to an application filed with the USDA by respondent, egg products inspection service was instituted on July 26, 1971, and has continued to date, except that said service is presently suspended pursuant to 7 CFR 59.160(f).

2. Only for purposes of this Stipulation and Consent Order, the respondent admits all of the jurisdictional allegations set forth in the Complaint and waives:

(a) Any further procedural steps;

(b) Any requirement that the final decision in these proceedings contain findings and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or bases therefor; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered pursuant to this Stipulation and Motion.

3. This Stipulation and Consent Order and Motion is for settlement purposes in these proceedings only and does not constitute an admission or denial by the respondent that it has violated any of the regulations or statutes involved.

4. Respondent's inspection service has been suspended in the past (October 1 through 3, 1975, and March 29 through 30, 1976) based on allegations that it used operating practices and procedures which were not in accordance with the regulations. Respondent consistently denies the allegations upon which these suspensions were based, but does admit that the suspensions were terminated by the USDA as a result of assurances, both verbal and written, by respondent that it would operate its plant in compliance with the requirements of the regulations in the future.

5. That on April 20, 1976, respondent consented to the issuance of an injunction against it by the Federal District Court for the District of New Jersey (Civil No.

76-699), which enjoined and restrained respondent in part, from processing egg products without complying with the operating practices and procedures required by the regulations.

6. That egg products inspection service at respondents processing plant has been, and will continue to be, administered in a fair and reasonable manner consistent with the administration of the egg products inspection service at all other official plants subject to such inspection.

7. The parties hereby move that the following Consent Order be issued as the final disposition of these proceedings:

Consent Order

1. Egg products inspection services are hereby withdrawn from the respondent, its officers, agents, servants, employees representatives, and all persons in active concert or participation with it, for a period fo twelve (12) months: **Provided, however,** That such withdrawal shall be held in abeyance and shall not become effective unless, within one (1) year from the effective date of this Order, the respondent or any officer, employee, agent, servant, or representative of the respondent fails to comply with any provisions of this Order, or commits substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 CFR Part 59.160(f)(1). Such failure to comply or commission of any such offense shall be deemed to have been established only after opportunity for hearing and final decision in a formal adjudicatory proceeding before the Secretary with all rights of judicial review exhausted. In such event, inspection services shall be withdrawn for the full period of twelve (12) months, and such withdrawal shall become effective immediately without further procedure.

2. Within 15 days from the effective date of this Order, the respondent shall submit to the Director, Poultry Division, AMS, a written statement of measures it will take, hereafter referred to as an affirmative action program, to insure that at all times in the future it will operate its egg products processing plant in compliance with the requirements of the regulations. Among other things, the written statement shall provide:

(a) Assurances that respondent will operate its plant in accordance with the regulations;

(b) An outline of proposed equipment and personnel changes that respondent will make at its plant; and

(c) An outline of instruction for respondent's employees concerning the proper operating practices and procedures set forth in the regulations that shall be followed at all times during egg products processing. The affirmative action program set up by respondent should be fully instituted within the 15-day time period provided for above, except as to equipment changes and modifications which should be completed by respondent as soon as practicable. Respondent shall provide a timetable for completion of such equipment changes and modifications.

3. The provisions of this Order shall be applicable to the respondent and its officers, directors, partners, agents, subsidiaries, or any business entity which, directly or through any corporate or other device, succeeds to the business of the respondent or is assigned that business: **Provided, however,** That this Order shall not be applicable to a successor or assign which does not have any officer or director or substantial investor who is now or was prior to the effective date of this Order connected with the respondent.

4. This Order shall not be construed to prevent the institution of action to withdraw egg products inspection services for any cause not covered in this Order.

5. This Order shall become effective upon service upon the respondent.

Leon Goldsman, Pres.	H. Connor Kennett, Jr.
Mountainside Butter	Director,
and Egg	Poultry Division, AMS
Irving Tobin	Thomas R. Clark
Attorney for Respondent	Attorney for Petitioner

APPENDIX G

Consent Order of The
UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE
In re: MOUNTAINSIDE BUTTER & EGG COMPANY
I & G Docket No. 64
(Dated — January 10, 1977)

This is a proceeding under the Egg Products Inspection Act (21 U.S.C. 1031 **et seq.**, hereinafter referred to as the "Act") and the regulations thereunder (7 CFR Part 59) to withdraw Federal Egg Products Inspection Service from respondent. A formal complaint, signed by the Director, Poultry Division, Agricultural Marketing Service, was mailed to respondent by the Hearing Clerk on January 5, 1977, setting forth the allegations which constitute the grounds for this administrative proceeding and availing respondent the opportunity to answer said allegations.

It being deemed desirable to the parties in this action to settle these matters, pursuant to section 50.21(b) a stipulation and the terms of the following consent order were agreed to by the parties, and a document entitled Stipulation and Consent Order and Motion for Issuance of the Order was signed by the parties and filed on January 7, 1977. A copy of that document is attached hereto and made a part hereof.

In these circumstances, and consistent with the agreement of the parties:

IT IS ORDERED THAT:

1. Egg Products Inspection Services are hereby withdrawn from the respondent, its officers, agents, servants, employees, representatives, and all persons in active concert or participation with it for a period of twelve (12) months: **Provided, however,** That such withdrawal shall be held in abeyance and shall not become effec-

tive unless, within one (1) year from the effective date of this Order, the respondent or any officer, employee, agent, servant, or representative of respondent fails to comply with any provisions of this Order or commits substantial violations which would be a basis for withdrawal of inspection services as currently specified in 7 CFR 59.160(f)(1). Such failure to comply or commission of any such offense shall be deemed to have been established only after opportunity for hearing and final decision in a formal adjudicatory proceeding before the Secretary with all rights of judicial review exhausted. In such event, inspection services shall be withdrawn for the full period of twelve (12) months, and such withdrawal shall become effective immediately without further procedure.

2. Within fifteen (15) days from the effective date of this Order, the respondent shall submit to the Director, Poultry Division, AMS, a written statement of measures it will take, hereafter referred to as an affirmative action program, to insure that at all times in the future it will operate its egg products processing plant in compliance with the requirements of the regulations. Among other things, the written statement shall provide:

(a) Assurances that respondent will operate its plant in accordance with the regulations;

(b) An outline of proposed equipment and personnel changes that respondent will make at its plant; and

(c) An outline of instruction for respondent's employees concerning the proper operating practices and procedures set forth in the regulations that shall be followed at all times during egg products processing.

The affirmative action program set up by respondent should be fully instituted within the 15-day time period provided for above, except as to equipment changes and modification which should be completed by respondent as soon as practicable. Respondent shall provide a

time-table for completion of such equipment changes and modifications.

3. The provisions of this Order shall be applicable to the respondent and its officers, directors, partners, agents, subsidiaries, or any business entity which, directly or through any corporate or other device, succeeds to the business of the respondent or is assigned that business: **Provided, however,** That this Order shall not be applicable to a successor or assign which does not have any officer or director or substantial investor who is now or was prior to the effective date of this Order connected with the respondent.

4. This order shall not be construed to prevent the institution of action to withdraw egg products inspection services for any cause not covered in this order.

5. This Order shall become effective upon service on respondent. A copy of this Order shall be served on the complainant and respondent.

Done at Washington, D.C.
January 10, 1977
Donald A. Campbell
Administrative Law Judge

APPENDIX H

UNITED STATES CONSTITUTION AND UNITED STATES REGULATIONS

UNITED STATES CONSTITUTION

AMENDMENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. REGULATIONS

7 CFR §59.160(f)(1)

REFUSAL, SUSPENSION, OR WITHDRAWAL OF SERVICE

(f) Suspension of plant approval and withdrawal of service.

(1) Any plant approval given pursuant to these regulations may be suspended by the Administrator for (i) failure to maintain premises, facilities and equipment in a satisfactory state of repair; (ii) the use of operating procedures or practices which are not in accordance with the regulations; (iii) the alterations of buildings,

facilities, or equipment which have not been approved in accordance with the regulations; or (iv) assaulting, intimidating, impending, obstructing, or interfering with any person engaged in or on account of the performance of his official duties.

7 CFR §504(c)

GENERAL OPERATING PROCEDURES

(c) All loss and inedible eggs or egg products shall be placed in a container clearly labeled "inedible" and containing a sufficient amount of approved denaturant or decharacterant, such as FD&C brown, blue, black, or green colors, meat and fish by-products, grain and milling by-products, or any other substance, as approved by the Administrator, that will accomplish the purposes of this section. Shell eggs shall be crushed and the substance shall be dispersed through the product in amounts sufficient to give the product a distinctive appearance or odor. Notwithstanding the foregoing, and upon permission of the Inspector, the applicant may hold inedible product in containers clearly labeled inedible which do not contain a denaturant if such inedible product is denatured or decharacterized prior to shipment from the official plant: **Provided,** That such product is properly packaged, labeled, segregated, and inventory controls are maintained. In additon, product shipped from the official plant for industrial use or animal food need not be denatured or decharacterized if it is shipped under Government seal and is received by an inspector or grader as defined in this part.

CLASSIFICATION OF SHELL EGGS USED IN THE PROCESSING OF EGG PRODUCTS

(a) The shell eggs shall be sorted and classified into the following categories in a manner approved by the National Supervisor:

(1) Eggs listed in paragraph (d) of this section.

(2) Dirty.

(3) Leakers as described in paragraph (c) (2) of this section.

(4) Eggs from other than chicken; duck, turkey, guinea, and goose eggs.

(5) Other eggs - satisfactory for use as breaking stock.

(b) Shell eggs having strong odors or eggs received in cases having strong odors shall be candled and broken separately to determine their acceptability.

(c) Shell eggs, when presented for breaking, shall be of edible interior quality and the shell shall be sound and free of adhering dirt and foreign material, except that:

(1) Checks and eggs with a portion of the shell missing may be used when the shell is free of adhering dirt and foreign material and the shell membranes are not ruptured.

(2) Eggs with clean shells which are damaged in candling and/or transfer and have a portion of the shell and shell membranes missing may be used only when the yolk is unbroken and the contents of the egg are not exuding over the outside shell. Such eggs shall be placed in leaker trays and be broken promptly.

(3) Eggs with meat or blood spots may be used if the spots are removed in an acceptable manner.

(d) All loss or inedible eggs shall be placed in a

designated container and be handled as required in §59.504(c). Inedible and loss eggs for the purpose of this section and §59.522 are defined to include black rots, white rots, mixed rots, green whites, eggs with diffused blood in the albumen or on the yolk, crusted yolks, stuck yolks, developed embryos at or beyond the blood ring state, moldy eggs, sour eggs, any eggs that are adulterated as such term is defined pursuant to this part, and any other filthy and decomposed eggs including the following:

(1) Any egg with visible foreign matter other than removable blood and meat spots in the egg meat.

(2) Any egg with a portion of the shell and shell membranes missing and with egg meat adhering to or in contact with the outside of the shell.

(3) Any egg with dirt or foreign matter adhering to the shell and with cracks in the shell and shell membranes.

(4) Liquid egg recovered from shell egg containers and leaker trays.

(5) Open leakers made in the washing operation.

(6) Any egg which shows evidence that the contents are or have been exuded prior to tranfer from the case.

(e) Incubator reject eggs shall not be brought into the official plant.

7 CFR §59.522

BREAKING ROOM OPERATIONS

(a) The breaking room shall be kept in a dust-free clean condition and free from flies, insects, and rodents. The floor shall be kept clean and reasonably dry during breaking operations and free of egg meat and shells.

(b) All breaking room personnel shall wash their hands thoroughly with odorless soap and water each time they enter the breaking room and prior to receiving

clean equipment after breaking an inedible egg.

(c) Paper towels or tissues shall be used at breaking tables, and shall not be reused. Cloth towels are not permitted.

(d) Breakers shall use a complete set of clean equipment when starting work and after lunch periods. All table equipment shall be rotated with clean equipment every 2½ hours.

(e) Cups shall not be filled to overflowing.

(f) Each shell egg shall be broken in a satisfactory and sanitary manner and inspected for wholesomeness by smelling the shell or the egg meat and by visual examination at the time of breaking. All egg meat shall be reexamined by a person qualified to perform such functions before being emptied into the tank or churn, except as otherwise approved by the National Supervisor.

(g) Shell particles, meat and blood spots, and other foreign material accidentally falling into the cups or trays shall be removed with a spoon or other approved instrument.

(h) Whenever an inedible egg is broken, the affected breaking equipment shall be cleaned and sanitized.

(i) Inedible and loss eggs as defined in §59.510 apply to this section.

(j) The contents of any cup or other liquid egg receptacle containing one or more inedible or loss eggs shall be rejected.

(k) Contents of drip trays shall be emptied into a cup and smelled carefuly before pouring into liquid egg bucket. Drip trays shall be emptied at least once for each 15 dozen eggs or every 15 minutes.

(l) Edible leakers as defined in §59.510(c)(2) and checks which are liable to be smashed in the breaking operation shall be broken at a separate station by specially trained personnel.

(m) Ingredients and additives used in, or for, processing egg products, shall be handled in a clean and sanitary manner.

(n) Liquid egg containers shall not pass through the candling room.

(o) Test kits shall be provided and used to determine the strength of the sanitizing solution. (See §§59.515(a)(9) and 59.552.)

(p) Leaker trays shall be washed and sanitized whenever they become soiled and at the end of each shift.

(q) Shell egg containers whenever dirty shall be cleaned and drained; and shall be cleaned, sanitized, and drained at the end of each shift.

(r) Belt-type shell egg conveyors shall be cleaned and sanitized approximately every 4 hours in addition to continuous cleaning during operation. When not in use, belts shall be raised to permit air drying.

(s) Cups, knives, racks, separators, trays, spoons, liquid egg pails, and other breaking equipment, except for mechanical egg breaking equipment, shall be cleaned and sanitized at least every 2½ hours. This equipment shall be cleaned at the end of each shift and shall be clean and sanitized immediately prior to use.

(t) Utensils and dismantled equipment shall be drained and air dried on approved self-draining metal racks and shall not be nested.

(u) Dump tanks, drawoff tanks, and churns shall be cleaned approximately every 4 hours. All such equipment and all other liquid handling equipment, unless cleaned by acceptable cleaned in-place methods, shall be dismantled and cleaned after each shift. Pasteurization equipment shall be cleaned at the end of each day's use or more often if necessary. All such equipment shall be clean and shall be sanitized prior to placing in use.

(v) Strainers, clarifiers, filtering and other devices used for removal of shell particles and other

foreign material shall be cleaned and sanitized each time it is necessary to change such equipment, but at least once every 4 hours of operation.

(w) Breaking room processing equipment shall not be stored on the floor.

(x) Metal containers and lids for other than dried products shall be thoroughly washed, rinsed, sanitized and drained immediately prior to filling. The foregoing sequence shall not be required if equally effective measures approved by the National Supervisor in writing are followed to assure clean and sanitary containers at the time of filling.

(y) Liquid egg holding vats and containers (including tank trucks) used for transporting liquid eggs shall be cleaned after each use. Such equipment shall be clean and sanitized immediately prior to placing in use.

(z) Tables, shell conveyors, and containers for inedible egg product shall be cleaned at the end of each shift.

(aa) Mechanical egg breaking machines shall be operated at a rate to maintain complete control and accurately inspect and segregate each egg to insure the removal of all loss and inedible eggs. The machine shall be operated in a sanitary manner.

(1) When an inedible egg is encountered on mechanical egg breaking equipment, the inedible egg and contaminated liquid shall be removed. The machine shall be cleaned and sanitized, or contaminated parts replaced with clean ones in a manner prescribed by the Administrator for the type of inedible egg encountered and the kind of egg breaking machine.

(2) Systems for pumping egg liquid directly from egg breaking machines shall be of approved sanitary design and contruction, and designed to minimize the entrance of shells into the system and be disconnected when inedible eggs are encountered. The pipelines of

the pumping system shall be cleaned or flushed as often as needed to maintain them in a sanitary condition, and they shall be cleaned and sanitized at the end of each shift. Other pumping system equipment shall be cleaned and sanitized approximately every 4 hours or as often as needed to maintain it in a sanitary condition. All liquid egg pumped directly from egg breaking machines shall be reexamined, except as otherwise prescribed and approved by the Administrator.

(3) Mechanical egg breaking equipment shall be clean and sanitized prior to use, and during operations the machines shall be cleaned and sanitized approxamtely every 4 hours or more often if needed to maintain them in a sanitary condition. This equipment shall be cleaned at the end of each shift.